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No. 10-822

SUPREME COURT, U.S.
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In the
Supreme Court of the United States

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, and JULIEN A.M. STARR,
Petitioners,

v.

STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioners Jeffrey Scott Barea and Julien A.M. Barr are individuals.

Petitioner College Standard Magazine is an unincorporated association.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

I. Procedural History of the Case 1

II. The Courts of Appeals have become deeply divided over whether the availability of nominal damages prevents a case from becoming moot. 3

A. The Second Circuit held that plaintiffs' stipulated nominal damages are insufficient to prevent mootness. 4

B. Even if the Second Circuit held that nominal damages are unavailable for facial challenges, such a holding is at odds with this Court's precedent and deepens a circuit split 7

C. Until the issue is resolved parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not. 11

D. In the decade since this Court's decision in Buckhannon the question whether nominal damages prevent a case from becoming moot, where the government has changed or repealed an alleged unconstitutional policy, has come strikingly to the fore.....12

CONCLUSION.....13

APPENDIX B

Decision of the U.S. District Court for the Northern District of New York (June 13, 2005) (Transcript of Proceedings containing decision.).....1b

Decision of the U.S. District Court for the Northern District of New York (February 6, 2007).....13b

TABLE OF AUTHORITIES

CASES:

Advantage Media, L.L.C. v. City of Eden Prairie,
456 F.3d 793 (8th Cir.2006) 10

Amidon v. Student Association of State University of New York at Albany,
508 F.3d 94 (2nd Cir. 2007) 1

Board of Regents of the University of Wisconsin v. *Southworth*,
529 U.S. 217 (2000) 2, 6

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,
532 U.S. 598 (2001) 8-9, 12-13

Carey v. Piphus,
435 U.S. 247 (1978) 8

City of Lakewood v. Plain Dealer Publishing Company,
486 U.S. 750 (1988) 6

Committee for the First Amendment v. Campbell,
962 F.2d 1517 (10th Cir.1992) 9

Davis v. Village Park II Realty Company,
578 F.2d 461 (2nd Cir. 1978) 5

Forsyth County, Georgia. v. Nationalist Movement,
505 U.S. 123 (1992) 6, 8

Freedom From Religion Foundation, Inc. v. City of Green Bay,
581 F.Supp.2d 1019 (E.D.Wis. 2008). 4, 7

Hernandez v. European Auto Collision, Inc.,
487 F.2d 378 (2nd Cir. 1973).....5

Memphis Community School District v. Stachura,
477 U.S. 299 (1986).....8

*Morgan v. Plano Independent School Dist*rict,
589 F.3d 740 (5th Cir. 2009).....4-5

Morrison v. Board of Education of Boyd County,
521 F.3d 602 (6th Cir. 2008).....4, 7

Rock for Life-UMBC v. Hrabowski,
2010 WL 5189456 (4th Cir. 2010) 11

Rosenberger v. Rector and Visitors of the University of Virginia,
515 U.S. 819 (1995).....2

Utah Animal Rights Coalition v. Salt Lake City Corporation,
371 F.3d 1248 (10th Cir. 2004).....4, 9

Virdi v. Dekalb County School District,
216 Fed.Appx. 867 (11th Cir. 2007) 9-10

Yniguez v. Arizona,
975 F.2d 646 (9th Cir. 1994).....10

Yniguez v. Arizonans for Official English,
69 F.3d 920 (9th Cir. 1995).....10

INTRODUCTION

In opposition, defendant argues that the Second Circuit correctly held that nominal damages are unavailable for facial challenges because plaintiffs suffered no harm under the policy. Petitioners were harmed by defendant's viewpoint discriminatory policy. Defendant changed its policy after the students-plaintiffs had paid their mandatory student fees, after their fees were distributed pursuant to the policy, and after plaintiff-CSM was denied funding. Moreover, whether the Second Circuit held that nominal damages are insufficient to moot a case or that nominal damages are unavailable in facial challenges, is of no great moment — under either holding a circuit split is created. In the end, defendant's reasons to deny the petition for certiorari are unpersuasive.

I. Procedural History of the Case.[1]

The SUNY Student Association ("SA" or "defendant") compelled students to pay it to fund speech by student groups.[2] The SA can force students like plaintiffs, Scott Barea and Julien

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[1] Defendant's recitation of the facts and procedural posture is inaccurate. Instead of correcting every error, petitioners will refocus on the relevant and correct history of the case.

[2] "Every semester, SUNY-Albany collects a mandatory student activity fee of $80 from each student . . . . A student who fails to pay this mandatory fee cannot register for classes and has his transcript withheld." *Amidon v. Student Ass'n of State University of New York at Albany*, 508 F.3d 94, 95 (2nd Cir. 2007).

Starr, to give their money to support speech of other students. *Board of Regents of the University of Wisconsin* v. *Southworth*, 529 U.S. 217 (2000). The SA fund is, however, a public forum; access to those funds is governed by "the same principles that are applicable [to physical fora.]" *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). To be more precise, the First Amendment requires viewpoint neutral decision making by the SA. *See Southworth*, 529 U.S. at 235.

It was undisputed that Barea and Starr paid their $80.00 fee and were students at SUNY Albany in good standing. JA 287.[3] It is also undisputed that CSM was a recognized student organization ("RSO") eligible for funding. JA 291.

Both parties cross-moved for summary judgment. The district court denied both motions. First, the district court denied defendant's motion — "A fair-minded trier of fact could conclude that plaintiffs were denied funding because of the contents of their publication." App. B at 8b.[4] However, despite the comments of several council members that demonstrated viewpoint basis, the district court required the plaintiffs to prove that a

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[3] "JA" refers to the joint appendix submitted by the parties to the Second Circuit.

[4] Appendix B is attached to hereto and it consists of the initial decision by the district court to deny both the cross-motions for summary judgment (1b-12b) and the amended final judgment (13b-14b).

majority of members voted not to fund CSM because of its viewpoint. App. B at 9b-10b.[5]

Instead of litigating the intentions of individual SA members, CSM conceded the as applied challenge because CSM could not produce evidence in light of the SA's refusal to provide reasons for its denial of funding. Plaintiffs chose to challenge the constitutionality of a policy that imbued the SA with unbridled discretion.

Upon plaintiffs' motion for reconsideration, the district court found that the SA's policy was inherently viewpoint biased on its face. Both parties stipulated that all plaintiffs suffered nominal damages. App. A. at 11a.[6]

II. The Courts of Appeals have become deeply divided over whether the availability of nominal damages prevents a case from becoming moot.

Defendant argues that the Second Circuit did not hold that nominal damages are insufficient to prevent mootness but rather that nominal damages are unavailable in facial challenges. Even if

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[5] One critical, pivotal and undisputed fact important to understanding subsequent events in the case is that the SA did not explain funding decisions. The SA admitted that "it [was not required to] provide an explanation for approving or rejecting funding for a particular recognized student organization ... ." JA 299 at ¶70]. Thus, SA's policy allowed it to deny a student group funding for any reason (App A. at 11a) and then not provide reasons for the denial.

[6] Appendix A is contained in the Petition for Writ of Certiorari.

defendant's interpretation is correct and the Second Circuit held that a request for nominal damages is unavailable for a facial challenge, such a holding calls into question precedent from this Court and deepens a circuit split on the issue.

In the end, whether nominal damages are unavailable for facial challenges or nominal damages are insufficient to prevent mootness because the award of nominal damages is equivalent to a declaratory judgment,[7] the result is still the same — the government can moot a case with a change of policy. Thus, no matter how the Second Circuit opinion is interpreted, the circuits are split on either interpretation.

These issues have been percolating in the Circuits for more than a decade, if not longer. It has become a problem in the vast area of §1983 litigation that needs to be addressed. *See* Petition at p. 12-16 (discussing the problems associated with this circuit split).

A. The Second Circuit held that plaintiffs' stipulated nominal damages are insufficient to prevent mootness.

Initially, defendant incorrectly argues that the Second Circuit has been clear that nominal damages suffice to prevent a case from becoming moot. As recently noted by the Fifth Circuit, *Morgan v. Plano*

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[7] *See e.g., Utah Animal Rights v. Salt Lake City Corp.*, 371 F.3d 1248, 1268 (McConnell, J. concurring); *Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602, 611 (6th Cir. 2008); *Freedom From Religion Foundation, Inc. v. City of Green Bay*, 581 F.Supp.2d 1019, 1031-1032 (E.D.Wis. 2008).

Independent School Dist., 589 F.3d 740, 749 n. 32 (5th Cir. 2009), the Second Circuit has taken inconsistent positions on the issue. *Compare Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2nd Cir. 1973) (holding that a claim for nominal damages does not avoid mootness), *with Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463-64 (2nd Cir. 1978) (holding that the availability of either nominal or substantial damages was sufficient to avoid mootness).

Next defendant argues that the Second Circuit held that plaintiffs suffered no harm and therefore nominal damages were unavailable. Defendant premised its argument on its interpretation of the part of the opinion which states that "[a]nd we could not order damages for any harm the policy inflicted on the plaintiffs because the as-applied challenge has been conceded. Any declaration that the policy was unconstitutional would be strictly advisory." 4a.

Defendant's interpretation cannot be correct. Plaintiffs were harmed by an unconstitutional system. The student-plaintiffs were required to pay into a facially unconstitutional system, their fees were distributed under that system, and CSM was denied funding under the policy that was inherently viewpoint biased. The suit was brought to redress these past harms.[8] Plaintiffs, both the students and CSM, were injured by the policy before it was altered and the alteration of policy did not wipe the slate for

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[8] Student-plaintiffs as fee payers were harmed differently than CSM. Curiously defendant never mentions the student-plaintiffs and never references the harm caused to them by the SA's unconstitutional system.

the past wrongs — defendant recognized this, the SA stipulated to the fact all plaintiffs suffered damages!

Moreover, the old policy violated the First Amendment. The policy vested defendant with unbridled discretion when deciding access to funding. Being subjected to unbridled discretion in the decision making process and having one's mandatory fees distributed through such a system is a constitutional harm, even if a particular funding decision is correct. It is the lack of standards in deciding access to the forum that violates the First Amendment,[9] not necessarily the results. *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133, n. 10 (1992) (noting that facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision).

The very vice of unbridled discretion is that it allows the government to conceal viewpoint discrimination. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988). Thus, in an unbridled discretion regime, damages from actual viewpoint discrimination are usually unprovable. Therefore, the appropriate expression of harm in an unbridled discretion case is generally the award of nominal damages.

Defendant acknowledged this harm — it stipulated to damages. Thus, when the Second Circuit said that it could "not order damages for any

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[9] This includes not only the rights of those seeking funding but also the students forced to provide the funding. *Southworth*, 529 U.S. at 235.

harm the policy inflicted on the plaintiffs because the as-applied challenge has been conceded," it meant that plaintiffs suffered no quantifiable compensatory damages under the policy, not that they lacked actual past redressable harm under the old policy which could be compensated by nominal damages. App. A at 4a.

The proper interpretation of the Second Circuit's decision is plaintiffs' award of nominal damages was insufficient to prevent the case from becoming moot in light of the changed policy. As explained in detail in the plaintiffs' petition (p. 5-11), the majority of the Courts of Appeals have held that the repeal of an unconstitutional law does not erase the slate and the award of nominal damages avoids mootness — two Circuits, the Sixth (*Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602, 611 (6th Cir. 2008)) and the Second have departed from the majority rule.[10]

B. Even if the Second Circuit held that nominal damages are unavailable for facial challenges, such a holding is at odds with this Court's precedent and deepens a circuit split.

Even if defendant's interpretation is correct and the Second Circuit held that a request for nominal damages is unavailable for a facial challenge, such a holding calls into question precedent from this Court and deepens a circuit split on the issue.

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[10] *See also Freedom From Religion Foundation, Inc.* 581 F.Supp.2d at 1031-32 (adopting the Sixth Circuit reasoning).

Although this Court has not dealt with this precise issue, it has held that nominal damages are available where a lawful result is reached but an unconstitutional policy is employed. The Court, in a student suspension case, held that even if "suspensions were justified, respondents nevertheless will be entitled to recover nominal damages . . ." because the process by which the students were suspended was unconstitutional. *Carey v. Piphus*, 435 U.S. 247, 267 (1978).

In other words, even if the decision is right, but the process is unconstitutional, §1983 plaintiffs still are entitled to nominal damages. *Carey's* logic applies with equal force in the arena of the First Amendment. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 309 (1986); *Cf. Forsyth County*, 505 U.S. at 133, n. 10 (noting that facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision). Thus, even if the SA did not deny CSM funding based on its viewpoint, but subjected CSM to an unconstitutional viewpoint discriminatory system (right decision, illegal process), nominal damages are available under this Court's precedent.

If the Second Circuit prevents plaintiffs like CSM (not to mention the student-plaintiffs who were forced to pay into an unconstitutional system and then had their fees distributed via the unconstitutional system) from recovering nominal damages in a facial challenge, then *Carey* has been seriously eroded. *Cf. Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 608-609 (2001)

(presuming nominal damages would be available in cases like this — "[any] fear of mischievous defendants [who would moot a claim by a belated change in policy] only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case.").

If defendant is right and the Second Circuit held that neither the student-plaintiffs nor CSM were entitled to nominal damages, then the Second Circuit holding conflicts with the majority of circuits. The Tenth, Eleventh, Eighth and Ninth Circuits have held that nominal damages are available for facial challenges.

In *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004), protesters brought an action against city defendants, raising facial challenges to the process for obtaining a permit to demonstrate. The City amended the ordinance. The district court dismissed the case as moot. The protesters appealed arguing that a request for nominal damages prevented their facial claim from being declared moot. *Id.* at 1258, n. 3. The Tenth Circuit found the facial claim justiciable and reached the merits of the facial claim. *See also, Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1526 (10th Cir.1992).

Likewise, the Eleventh Circuit determined that nominal damages are available in facial challenges. In *Virdi v. Dekalb County School Dist.*, 216 Fed.Appx. 867, 872-873 (11th Cir. 2007) a student had challenged a university system of racial preferences as applied and on its face. The Court

dismissed the as applied challenge but held that the policy was facially unconstitutional. The Eleventh Circuit found that the student was entitled to nominal damages on his facial claim. *Id.* at 873.

Similarly, in *Advantage Media, L.L.C. v. City of Eden Prairie,* 456 F.3d 793, 801 (8th Cir.2006), the Eighth Circuit concluded that the city reached the correct in denying plaintiff a sign permit. Nevertheless, even assuming "the substantive provisions of the sign code ... constitutional," plaintiff would "be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures." *Id.* at 803. The primary procedural deficiency which [plaintiff alleges] is the supposedly unbridled discretion city officials had ... to deny [sign] applications." *Id.* at 804. The request for nominal damages would prevent mootness even though the "the deficiencies [plaintiff] alleges were remedied after this action commenced." *Id.* at 803.

In a series of opinions, the Ninth Circuit held that a plaintiff who makes a facial challenge to a statute is entitled to nominal damages. *Yniguez v. Arizona,* 975 F.2d 646, 647 (9th Cir. 1994). *See Yniguez v. Arizonans for Official English,* 69 F.3d 920, 949 (9th Cir. 1995) rev'd on other grounds by *Arizonans for Official English v. Arizona,* 520 U.S. 43 (holding that an award of nominal damages ... is singularly appropriate in First Amendment overbreadth cases).

In contrast, the Fourth Circuit recently reached the opposite conclusion. Among other claims, a group of students brought a facial challenge to a university policy that gave the

university unbridled discretion in determining access to the forum. Plaintiffs alleged that the unbridled discretion chilled their speech and sought declaratory relief and nominal damages. The university amended its policy. The Fourth Circuit dismissed the case because "the plaintiffs' facial challenge to the policy is moot notwithstanding the fact that it seeks the recovery of damages rather than injunctive relief." *Rock for Life-UMBC v. Hrabowski*, 2010 WL 5189456, 8 (4th Cir. 2010).

Even if defendant's interpretation is correct and the Second Circuit has held that a request for nominal damages is unavailable to plaintiffs who make a facial challenge to a policy, such a holding calls into question precedent from this Court and deepens a circuit split on the issue.

C. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not.

In the end, whether the Second Circuit (like the Fourth Circuit) says that nominal damages are not available for facial challenges or it (like the Sixth Circuit) says that nominal damages do not prevent mootness because the award of nominal damages is a declaratory judgment, the result is still the same — the government can moot a case with a change of policy. To say that only declaratory relief and not nominal damages are available in a facial challenge, or to say that the award of nominal damages is the

equivalent to a declaratory judgment is to say the same thing in this context.[11]

These issues have been percolating in the Circuits for more than a decade, if not longer. It affects a host of cases and has become a problem that needs to be addressed. It is unfair to one side — either cases like this one should be dismissed as moot or plaintiffs, like petitioners here, should prevail and be awarded nominal damages together with their fees and costs. Either governments are paying when they should not have to, or plaintiffs are being denied their costs and fees when they deserve to be reimbursed. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not. An unclear rule invites a waste of resources. Both questions are fairly presented on this record and petitioners ask this Court to grant certiorari.

D. In the decade since this Court's decision in *Buckhannon* the question whether nominal damages prevent a case from becoming moot, where the government has changed or repealed an alleged unconstitutional policy, has come strikingly to the fore.

Defendant mistakes plaintiffs' argument concerning *Buckhannon*. The catalyst theory is not at issue here. Rather the elimination of that theory

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[11] Moreover, the issue of the availability of nominal damages is a prerequisite to and fairly subsumed by the broader question of whether a request for nominal damages prevent mootness.

has caused a change in behavior of § 1983 litigants. *See* Petition at p. 16-18. It is this change of behavior in response to *Buckhannon* that has forced courts to address whether nominal damages prevent mootness in the face of changed policy. The issue has spawned a deep circuit split and petitioners urge the Court to grant their petition to resolve the split.

CONCLUSION

Petitioners respectfully ask this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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April 5, 2011

APPENDIX B

Decision of the U.S. District Court for the Northern District of New York (June 13, 2005) (Transcript of Proceedings containing decision.) 1b

Decision of the U.S. District Court for the Northern District of New York (February 6, 2007) 13b

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.*

Plaintiff, 03-CV-505

-versus- **(Decision)**

STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*,

Defendant.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York, 12207, on MONDAY, JUNE 13, 2005, before the HON. THOMAS J. McAVOY, United States District Court Judge.

APPEARANCES:

FOR THE PLAINTIFF:

OLIVER, OLIVER LAW FIRM [sic]
BY: LEWIS B. OLIVER, ESQ.

FOR THE DEFENDANT:

BY: THOMAS MARCELLE, ESQ. [sic]

THE CLERK: College Standard Magazine, et al. versus Student Association of the State University of New York at Albany, 2003-cv-505.

May I have the appearance for the Plaintiff please.

MR. OLIVER: Lewis B. Oliver for the plaintiff, your Honor.

Mr. MARCELLE: I'm sorry, I think that's a mistake.

THE COURT: You are for the defendant.

MR. OLIVER: Oh, for the defendants.

THE COURT: I know you are used to representing the plaintiffs.

MR. MARCELLE: Tom Marcelle of Albany for the plaintiffs.

THE COURT: Mr. Marcelle, is that your daughter back there?

MR. MARCELLE: Yes, your honor.

THE COURT: Is she going to prompt you?

MR. MARCELLE: She inherited a lot of her mother's Sicilian flavor.

(Oral argument heard.)

(Bench decision rendered):

THE COURT: No, I'm satisfied. I think you both presented the case very well, completely, even over completely in some cases, but enough to give me an indication of what you were arguing and what the different viewpoints are. And that's appreciated by the Court.

The plaintiffs, individuals representing a group of students at SUNY Albany, commenced the instance action a challenging defendants' decision to deny funding to their group, the college Standard Magazine. Plaintiffs contend that the denial of funding was content based, in violation of the First Amendment.

Briefly stated, the relevant facts are as follows: College Standard Magazine is a recognized student organization. The student association is an unincorporated association that, as is pertinent hereto, received its funding from a mandatory student activity fee. Subject to criteria set forth in New York State regulations and final oversight and approval by the university, the student association made decisions on how to allocate funding to the various student organizations seeking funding. College standard Magazine did not apply for funding as a line item in the 2002-2003 budget for the 2002-2003 academic year. Instead, in September of 2003, it applied for funding as a new start-up group. The student association's financial arm proposed a bill to fund plaintiffs in the amount of $350. Various persons on the student association central council,

the legislative arm of the student association, voiced objection to funding the College Standard Magazine. Some of the objections were because of its salacious articles, it's particular view of conservatism, and because of its claimed obnoxious articles. There also is some evidence in the record that members of the central council may have stated that there was not a need for conservative voice on campus. After much debate, the central counsel [sic] voted 14 to 6 to deny funding to plaintiffs.

Plaintiffs commenced this action claiming that Defendants conduct violated their First Amendment rights. The defendant student association claims it is not a state actor, and thus, is not subject to liability for claimed First Amendment violations. The student association previously moved to dismiss the claims against it on this very ground. The Court previously ruled that the student association acts under color of state law for purposes of 42 U.S. Code Section 1983.

So, respectfully, Mr. Oliver, I will have to say that that is the law of the case.

But even so, whether the student association acts under color of state law is not all that clear cut. However, in light of the facts that the student association is funded by a mandatory student activity fee, the University collects the fee at registration, the payment of the fee is enforced by the University, the student association is empowered to deny participation in student activities to any student who does not pay the fee, state regulations govern the preparation of budgets for expenditure of the fees, the student association has broad discretion to disburse the funds, the university retains

oversight over such budget and the disbursement of funds, state regulations govern the use of the funds and, importantly, the university retrains, quote, final determination for approval of compliance with 8 New York Code rules and Regulations Section 302.13 of any fiscal commitment, close quote, and for the reasons stated in the Court's prior ruling, the student association can fairly be found to be acting under color of state law. That conclusion is further supported by the student association's contention that it received advice and counsel from the University concerning how to make funding determination. Specifically, the student association claims that it met with University officials who explained the need t make funding decisions in a content neutral manner. Moreover, the strong ties between the University and the funding of groups through the student association as discussed in *Carroll v. Blinken*, 957 F.2d 997, also support a finding of state action.

The student association also again raises the Eleventh Amendment immunity which was previously found not to apply. There may be facts suggesting the student association is an arm of the state and, therefore, entitled to Eleventh Amendment immunity. If such facts exist, they have not been presented to the Court for review. The student association contends that because SUNY is an arm of the state that it is entitled to Eleventh Amendment immunity, then it too is entitled to immunity. However, the student's association makes the factual leap that it is an arm of the University. There is no evidence in the record to this effect. The only evidence concerning the creation and status of the student association is that a – is that it is a

voluntary, unincorporated association. There's no evidence that it was created by the state or by the University or that it was otherwise an arm of the state.

Accordingly, on the facts presented, there is no Eleventh Amendment immunity.

With respect to the issues of legislative and qualified immunity, the Court adheres to its prior rulings. Legislative immunity and qualified immunity apply only to individuals. There being no individual defendants, there can be no legislative or qualified immunity.

Have disposed of the students' association's defenses, the Court will now address the merits of the First Amend claims.

The governing principles here is that of viewpoint neutrality in the allocation of funding support. *Board of Regents of University of Wisconsin v. Southworth*, 120 Supreme Court 1346. As the Supreme Court stated in *Southworth*, quote, when a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others, close quote. *Southworth*, at 1356.

In this suite, plaintiffs are not challenging the New York State regulations governing the mandatory student activity fee. Rather, they are challenging the manner in which the decision was made to deny them funding. It's their claim that the

decision was viewpoint based and, therefore, violated their First Amendment rights.

The student association admits that at all relevant times there were no policies regarding the funding process. It appears that they have since adopted policies, as mentioned by Mr. Oliver. Nevertheless, the student association contends that it was aware of *Southworth* at the time it made its funding decision concerning plaintiffs and that it acted in a viewpoint neutral way. The student association contends that it was aware of *Southworth* at the time it made its funding decision concerning plaintiffs and that it acted in a viewpoint neutral way. The student association contends that I denied funding based on considerations including whether the organization was active on the entire campus, whether it was accessible to a wide range of students, and whether it was a small group that might spend its allocation on a group party. The student association contends that it was its policy to consider how many active members the organization had. Plaintiffs, on the other hand, submitted an affidavit from a then-member of the central council, Eric Amidon, who denies that the central council ever discussed the *Southworth* decision before denying funding to plaintiffs. Amidon also recounts that it was the student association's belief that it was not bound by the *Southworth* decision. This state is supported by the affidavit of plaintiffs Star and Barea – how do you pronounce that –

MR. OLIVER: Barea.

THE COURT: -- Barea, who both claim that MacNamara stated that the student association was

not bound by *Southworth*. Amidon also stated that he voted against funding plaintiffs because of its salacious articles, its twisted views and conservatism, its aggressive style and because it gave conservatives a bad name. In his affidavit, Jamie McNamara stated that funding was denied, at least in part, because it was believed that the plaintiffs' publication was obnoxious and offensive and that he newspaper published by plaintiffs contained a few articles about political or conservative issues. Another central council member, Anton Konev, stated that he voted to deny funding to plaintiff because, quote, pride alliance, a gay student organization, has been to judicial affairs because of this newspaper. We have students against this newspaper already; that is why I would say we should save this money for someone who everybody thinks should get the money, close quote. McNamara also is purported to have stated that, quote, we don't need a conservative presence on campus, close quote. McNamara denies making any such statement.

Looking at this evidence in the light most favorable to plaintiffs, a fair-minded trier of fact could conclude that plaintiffs were denied funding because of the content of its publication. Statements concerning plaintiffs' views of conservatism, whether they give conservatives a bad name, whether their articles are obnoxious, whether there was enough support for the group, whether a conservative presence is needed on campus and whether everybody thinks the newspaper should get money could be found to be content based.

Another potential First Amendment liability is in the degree of discretion afforded the student

association in granting funds. See *Transportation Alternatives Incorporated v. City of New York*, 340 F.3d 72, at 77. That case noted that regulations may not delegate overly broad discretion to the decision makers. On the one hand, funding decisions must be made in accordance with applicable New York State regulations and approved by the University. On the other hand, defendants admit that there were no written policies governing their funding decisions. They contend, however, that there were unwritten policies in this regard. Plaintiffs, however, have submitted affidavits from student association members attesting to the lack of any such unwritten policies. Thus, there's a triable issue of fact whether defendants had unbridled discretion to restrict speech.

The defendants next argue that even if some members of the student association voted to deny funding to plaintiffs for impermissible reasons, there's no evidence that a majority of the members did so. In this case there were 21 members of the student association present to vote on funding plaintiffs. Fourteen voted against funding and six voted for funding. One abstained.

In Title VII discrimination cases it has been held that, quote, the impermissible bias of a single individual at any stage of the decision-making process may taint the ultimate decision in violation of the Title VII. This is true even absent evidence of illegitimate bias on the part of the ultimate decision maker so long as the individual shown to have the impermissible bias played a meaningful role in the decision-making process. *Bickerstaff v. Vassar College*, 196 F. 3d 435. It's not often I'm able to cite

my own decision on the Second Circuit level, but I have the pleasure of doing so today. Had to find a way to work it in.

This reasoning should equally apply to allegations of viewpoint discrimination and, thus, will be extended to the First Amendment analysis. See *Beck v. Hastings on Hudson Union Free School District*, 365 F.3d 107, at 125.

Here, there is evidence of at least three student association members who, as previously discussed, could be found to have voted to deny funding for impermissible reasons. One of these members, Jamie McNamara, was the chairman of the student association and, thus, could be found to played a prominent role in the association and in the voting. There's also evidence that there was much debate over whether to fund plaintiffs' publication. A fair-minded trier of fact could, therefore, reasonably conclude that one or more of these individuals tainted the minds of the other voting members ad, thus, the ultimate decision to deny funding. Although plaintiffs have an uphill battle in this regard, the Court cannot say that no fair-minded trier of fact could find in their favor. Accordingly, defendant's motion for summary judgment is denied.

Conversely, looking at the evidence in the light most favorable to defendants, a fair-minded trier of face could conclude that defendants had a justifiable non-content based reason for denying funding. The trier of fact could conclude, for example, that any viewpoint oriented statements or beliefs of certain student association members did not affect the vote.

Accordingly, plaintiffs' cross-motion for summary judgment is also denied.

For the foregoing reasons, the defendants' motion and plaintiffs' cross-motion for summary judgment are denied.

Defendants shall submit an order on notice to plaintiff within 11 days of today's date.

Thank you for your interesting argument. We'll have to save all that for a jury.

MR. OLIVER: Thank you, your Honor.

MR. MARCELLE: Thank you, your Honor.

THE COURT: Your [sic] welcome. Sorry I couldn't dispose of it one way or the other; just looking forward to having too much fun trying it.

(Court adjourned at 11:10 AM.)

CERTIFICATION'

I, BONNIE J. BUCKLEY, RPR, Official Court Reported in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

s/ BONNIE J. BUCKLEY, RPR

BONNIE J. BUCKLEY, RPR

USDC Court Reporter – NDNY

DATED: AUGUST 29, 2005

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

COLLEGE STANDARD MAGAZINE, *et al.*

Plaintiffs,

v.

STATE UNIVERSITY OF NEW YORK AT ALBANY, *et al.*,

Defendant.

Case No. 1:03-CV-505

THOMAS J. McAVOY
Senior United States District Judge

ORDER

The parties have submitted a proposed order to the Court purporting to resolve what they believe to be a non-final judgment entered in this action on October 18, 2006. The apparent basis for the parties' belief is that, after noting that the Court found the student association's funding policy was unconstitutional, the Judgment continues to state, in part, that: "however, the Court did not reach a decision as to the remaining cause of action relating to the discriminatory voting practice." The Court did not need to address whether the voting scheme was

unconstitutional because it found that the process by which funding is allocated (including the voting scheme) was unconstitutional. Stated otherwise, the constitutionality of the voting process, which was a part of the funding process, was subsumed by the finding that the overall funding scheme was unconstitutional.

In light of any potential confusion regarding the language in the Judgment, the Court hereby grants the motion to amend the judgment and directs that the Judgment be amended as follows: (1) to reflect that the Plaintiff's motion for summary judgment was granted in accordance with the September 3, 2005 Order; not the July 9, 2005 Order; and (2) omitting the above-quoted language.

IT IS SO ORDERED

Dated: February 6, 2007

Thomas J. McAvoy
Thomas J. McAvoy
Senior, U.S. District Judge